(3)

No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et. al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

HERBERT F. KAISER*
The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

64 pp

REASON FOR SUPPLEMENTAL BRIEF

Petitioners Supplemental Brief is based on the following decisions occurring after the filing of the Petition on May 31, 1988: *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, No. 87-157, 486 U.S. ____, 108 S.Ct. 1931, (decided June 13, 1988) (Appendix IX, B-21-43) holding taht a conspiracy involving and including public officials would not be immunized by the Noerr-Pennington Doctrine (108 S.Ct. 1938, fn.7, (B-30); *Sessions Tank Liners, Inc., dba Southwest Tank Liners, Inc. v. Joor Manufacturing, Inc.*, No. 87-916 (decided June 27, 1988) granting cert. and remanding to 9th Circuit. (Appendix X, B-44); 9th Circuit Decision July 22, 1988, remanding to District Court for further evidence establishing antitrust violations (Appendix XI, B-45, 46); Judgment of Dismissal of Petitioners' state court claims of inverse condemnation and promissory estoppel based on doctrine of collateral estoppel of the Ninth Circuit decision immunizing activity of respondents based on state action and Noerr-Pennington Immunity Doctrines. (Appendix III and IV, B-8-12).

ISSUES RELATED TO NEW CASES

A. Is the Ninth Circuit decision contrary to *Allied Tube, supra*?

B. Is a conspiracy involving and including the executive director of the Redevelopment Agency, Frank Taylor, to give the Koll Company a monopoly and market power in a market in which the legislature has expressly prohibited the displacement of competition immunized by the Noerr-Pennington Doctrine?

C. Should Petitioners be allowed discovery to determine and establish the extent and nature of the antitrust violations charged in conformance with the recent decision in *Sessions Tank, supra*?

D. Is the conduct of the executive director of the Redevelopment Agency, Frank Taylor, denying Petitioners the parking promised in the original redevelopment plan (B-1) and the amended plan (B6-7) in conspiracy with Koll, an administrative

decision which would not be immunized by the Noerr-Pennington Doctrine?

E. Was the 1983 amended plan (B4-7) a sham meant to deceive Petitioners thus establishing the sham exception to the Noerr-Pennington Doctrine?

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SUPPLEMENTAL BRIEF OF PETITIONERS

OPINION BELOW

The Opinion and judgment of the Court of Appeals (Appendix A-1-22) affirmed the dismissal of Petitioners Second Amended Complaint without leave to amend, relying in part on its clearly erroneous finding pursuant to Rule (b)(6) FRCP.[1]

STATEMENT OF THE CASE

Neither the Ninth Circuit or the respondents have ever discussed or addressed the real factual graveman of this action, that is a conspiracy involving the executive director of the Redevelopment Agency and the Koll Company to publicly propose a sham invalid amended redevelopment plan (Appendix II, B-4-7) which supposedly provided petitoners with their essential parking requirements when in fact secretly the executive director and Koll Company had conspired to restrain trade in a market in which the state legislature prohibited the displacement of competition, by denying petitioners their essential parking through adminsitrative action of the director. (Appendix C, A-46, 55, 56)

In December of 1983 the executive director of the Redevelopment Agency, Frank Taylor, and the Koll Company publicly proposed to amend the redevelopment plan to provide for condemnation although blight had been alleviated by private enterprise acting alone, Appendix VI, B-15. But to deceive petitioners not to challenge the Amended Redevelopment Plan within the

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[1]References to the Appendix are given in the following form: page 1 of the Appendix to the original Petition is referred to as Appendix A, "A-1", etc.; page 1 of the Appendix to the Supplemental Brief is referred to as Appendix I (Roman Numeral), "B-1," etc.

After taking extensive discovery defendants move for dismissal pursuant to Rule 12(b)(6). The District Court granted that motion without leave to amend, relying in part on its clearly erroneous finding that petitioners had stipulated to the order staying discovery when in fact petitioners opposed the staying of discovery and the order so recites that the nature of the hearing was contested (Appendix B, A-27; Appendix I, A-159-160; Petition p. 5)

60-day period provided for in H&S Code § 33500[2] they incorporated into the plan various provisions for ***"adequate land for parking and open spaces" and "parking facilities," "of benefit to the project area."*** (Appendix II, B-6-7).

The deception was successful and on December 6, 1983, Frank Taylor, executive director of the agency proposed the amended redevelopment plan (without the required finding of blight) to the City Council and it was adopted with the stated provisions for parking (Appendix II, B-6-7) and not protested by petitioners, who were in fact deceived by the promises of parking made both in the plan and elsewhere by the conspirators. (Appendix C, Ap-51-55)[3]

In November 1984, 11 months after the amended plan was adopted, and 8 months after the Koll project was approved the Agency by administrative decision *denied* dedicated parking to all building owners other than Koll. With this administratively granted parking monopoly defendants could carry out their design to grant Koll a monopoly in office space rental. (Appendix C, 55, 56)

Thus, Koll has been able to acquire 2 buildings by distressed sale and force petitioner and another building into foreclosure and bankruptcy with the likelihood Koll will also acquire these buildings because Koll has all the parking. (Petition p. 4)

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[2] In fact, both the Agency and Koll used the deception in their successful attempts to have petitioners' Federal and State Court actions dismissed for failing to challenge the 1983 Amended plan within the statutory 60-day period (Appendix VII, B-16-18; Appendix VIII, B-19-20).

[3] The Ninth Circuit has held that it is not required to name the "other conspirators." A plaintiff need not sue all conspirators, he may chose to sue but one. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963).

REASONS FOR GRANTING WRIT

I., II., and III.*

THE *ALLIED TUBE* DECISION MAKES CLEAR THAT DEFENDANT HERE HAVE NO *NOERR-PENNINGTON* IMMUNITY

By finding Noerr-Pennington immunity for defendant The Koll Company ("Koll"), the decision below is directly contrary to this Court's recent decision in *Allied Tube Conduit Corp. v. Indian Head,* June 13, 1988, No. 87-157, 486 U.S. ____; 108 S.Ct. 1931 (June 13, 1988) (B-21).

As pleaded here the facts show a secret conspiracy between Koll and Redevelopment officials to exclude competitors and monopolize a commercial rental market *in violation* of the state statute giving the redevelopment agency power to act only when private enterprise cannot eliminate blight. Here private enterprise *had* successfully developed the area and had eliminated blight. *Emmington v. Solano County Redevelopment Agency,* 195 Cal.App.3d 491, 497, 237 Cal.Rptr. 636 (June 1987); *Regus v. City of Baldwin Park,* 70 Cal.App.3d 968, 980, 139 Cal.Rptr. 196 (1977) (See, Petition p. 10).

Thus, without *any* legislative authority to displace competition or commit anti-competitive conduct, the Redevelopoment Agency, by involving itself in the business of Koll's office space development was essentially acting in connection with commercial transactions and was in fact secret competitor illegally using its power for the benefit of Koll. As held in *Allied Tube, supra*:

> "Just as the antitrust laws should not regulate political activities 'simply because those activities have a commercial aspect' (citation omitted) so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." 56 L.W. 4542-3; 108 S.Ct. 1941 (B-35).

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* The reasons for granting Writ (page iii) are by nature interwoven therefore they are presented in one argument and incorporated herein by reference.

As pointed out in both the majority and dissenting opinions in *Allied Tube, supra,* the real intent of the *Noerr* doctrine is the protection of free and open discourse between citizens and other persons and the government. Both opinions condemn bribery and misrepresentation in connection with that communication, yet the pleaded facts imply both and allege illegal campaign contributions, other inducements to violate state law, and numerous misrepresentations. (Appendix C, A-44; Appendix J, A-163-174; Appendix K, A-175-184) And neither the majority or dissent adopt the position, essentially adopted by the Niinth Circuit in this case, that simply because *some* governmental act is involved, *all* activity aimed at attaining that act is protected. The Ninth Circuit, by here finding *Noerr* immunity, essentially adopted the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." A position condemned by this Court in *Allied Tube, supra,* at 108 S.Ct. 1938 (B-31).

This Court noted in footnote 7 of the *Allied Tube* majority opinion, 108 S.Ct. 1938 (CB-30), that *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), at 513, held that conspiracy with a licensing authority to eliminate a competitor may violate the antitrust laws. In the same footnote, it was indicated that a *conspiracy* involving and including public officials would not be immunized. Further, the footnote cites to the decision in *Continental Ore Co. v. Union Carbide & Carbon Co.,* 370 U.S. 690, 707-708 (1962) where in it was held that where commercial activities are involved:

> "To subject to liability under the Sherman Act for eliminating a competitor . . . would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constutionally protected freedom spoken of in *Noerr.*"

That same footnote cited 1 P. Areeda & D. Turner, *Antitrust Law,* § 201-206 (1978) wherein it is made clear that the *Noerr* doctrine protects neither improper conduct nor conduct in connection with commercial transactions.

The Ninth Circuit had supported this position, for example, in *Sessions Tank Liners, Inc., dba Southwest Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 488 at 466 (9th Cir. 1987):

> 3. *Conspiracy.*
>
> Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *See Clipper Express,* 690 F.2d at 1252 n. 17; *Harman v. Valley Nat's Bank,* 339 F.2d 564, 566 (9th Cir. 1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). (Emphasis added.)

In this action the Ninth Circuit abandoned its prior rule. (Appendix A, A-21).

The opinion below was contrary to *each* of these points. The core of the instant case is that there was a conspiracy between Koll and the Redevelopment Agency officials in connection with the commercial development of office space to eliminate all of Koll's competitors. To extend *Noerr* immunity to such a conspiracy is plainly contrary to *each* aspect of footnote 7 of the *Allied Tube* decision. While the dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious, here the intentional and duplitious acts successfully aimed at eliminating the competitors of Koll, in contravention of the state authorizing statute, surely are the result of the private, secret action of Koll.

In its 1987 decision in *Sessions Tank Liners, Inc., supra,* the Ninth Circuit applied the *Noerr-Pennington* doctrine to immunize open lobbying within a private standard setting association. Had the Ninth Circuit adhered to the law as it stated in *Session* in 1987, it would have here denied Koll its requested immunity. It then held, at 827 F.2d 465 fn.5:

> "But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means*. . . . [citation omitted] In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus, de-

fendant's 'success or failure' is 'one indicator' of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), *but it is not dispositive.*

"Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous—rather than unethical—petitioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams." *See* Hurwitz, *supra* note 4, at 109.[4]

Koll publicly requested permission to build a building in the project area but *secretly* conspired to administratively deny petitioners and other building owners any parking so that Koll could take over their buildings monopolizing the market.

In *Sessions* the Ninth Circuit found none of the improper means or misuse of the petitioning privilege which are clearly present in the conspiracy here in detail. It applied *Noerr-Pennington* immunity as immunizing the proper lobbying there presented. Yet this Court *reversed Sessions* holding that even such lobbying might be denied *Noerr-Pennington* immunity. And the Ninth Circuit, in its opinion of July 22, 1988, remanded to the District Court for factual findings. The reversal of *Sessions,* where summary judgment had been granted after full discovery, makes even more clear the need for reversal here where it must be taken as true that there was a secret monopolizing conspiracy undercutting ligitimate government functions and law. To subject to liability open communication with private associations while immunizing secret monopolistic deals with redevelopment officials does not serve the democratic interests protected by Noerr-Pennington.

Allied Tube, in footnote 10, 108 S.Ct. 194, Appendix IX, B-35, emphasizes the difficulty of drawing precise lines between immunized political activity with political impact from unprotected

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[4] *Sessions, supra,* holds on page 468 "Where executive action sought was more a matter of *administering* than making law misrepresentations inducing governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine." (Emphasis added.)

activity. It criticizes the Ninth Circuit approach to the "sham" exception to *Noerr-Pennington* which immunizes the use of improper means to achieve genuinely desired results. It was that criticized approach which the Ninth Circuit used in the instant case. Without any factual development as an act to determine on which side of the line the Koll's activity fell, the Ninth Circuit found complete immunity for its secret conspiratorial activities to undermine legitimate government functions.

There is a third major inconsistency between the holding of the Ninth Circuit in this case and that of this Court in *Allied Tube, supra.* In *Allied Tube* this Court held at Appendix IX, 108 S.Ct. 1939-B-32):

> "We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government *depends not only on the impact, but also on the context and nature of the activity.*" (Emphasis added.)
>
> "What distinguishes this case from *Noerr* and its progency is that the context and nature of [the] activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."

The Court in *Noerr* concluded that the political context and nature of the activity did preclude inquiry into its antitrust validity.

However, in the instant case as in *Allied Tube, supra,* the content and nature of the activity do *not* counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr,* the activity here at issue did *not* take place in the open political arena, where partisanship is the hallmark of decision making, but instead was within the confines of private, administrative and secret meetings and was designed to circumvent the normal political and decision making process and in fact violated State law prohibiting the very anti-competitive conduct charged herein.

The activity here, a scheme to use various illegal means to monopolize parking in an area and thereby monopolize the market for office rentals, if carried out completely in the private

sector would be one which would normally be held violative of the Sherman Act. As held in *Allied Tube, supra*:

> "just as the antitrust laws should not regulate political activities 'simply because those activities have a commercial impact' [citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." 108 S.Ct. 1941 (B-35)."

As a final note, it should be pointed out that the Ninth Circuit considered that petitioners might gain relief through their state court action. (Appendix A, A-10) Yet there can be no relief there since defendants, on collateral estoppel grounds, based on this action sought and obtained dismissal of that state court action (Appendix III, B-10). So by granting immunity in this action, the courts below effectively immunized defendants illegal monopolistic conduct.

CONCLUSION

Allied Tube makes clear that where there is presence of, as here, conspiracy, violations of State law, misrepresentation, and bribery in connection with monopolization in an area of commercial activity in which a Redevelopment Agency has wrongfully involved itself prevent *any* application of *Noerr-Pennington* immunity.

Dated: September 23, 1988

Respectfully submitted,

HERBERT F. KAISER
Attorney for Petitioners

APPENDIX TO SUPPLEMENTAL BRIEF OF PETITIONERS

PUEBLO UNO REDEVELOPMENT PLAN

Prepared by

The Redevelopment Agency
of the City of San Jose

Adopted by

The City Council on
July 8, 1975,
Ordinance No. 17778

* * * *

3. Parking

Private parking shall be permitted in conjunction with retail or office developments. Interim surface parking is permitted in phased developments, ultimately to be replaced by retail or office uses at the first floor level. Parking shall serve the short-term demand generated by the permitted land uses. The long range objective is to eliminate curb and surface parking in the core area. **However, phased development must consider the needs of existing business.** There is no intent in this plan to reduce the parking and traffic facilities essential to the operation of present business.

The intent of the Core Area Plan is to develop off-street parking for short-term commercial uses and residential uses conveniently located at the generators of activity. Long-term parking for such commerical uses is intended to be provided around the periphery of the project with a traffice distribution network established to connect those areas with the core. The City is now discussing with the County Transit District ways and means of developing a shuttle system connecting off-street parking, peripheral parking and activity centers within the core area.

* * * *

301 Owner Participation and Rehabilitation

Because this project does not rely on condemnation proceedings to achieve its objective, the project must rest on the cooperative spirit of the City, the Redevelopment Agency, property owners and tenants of the Project Area to achieve success. The City of San Jose and the Redevelopment Agency will encourage viable rehabilitation programs but private cooperation will be required to implement the rehabilitation programs.

In the event an owner is unable to cooperate in the redevelopment or rehabilitation of his property and with the consent of the owner the Agency *may*, if funding sources are available, acquire (by purchase, lease, grant, bequest, or otherwise) all or a sufficient interest in the property in order to carry out the objectives of the Plan.

* * * *

309 Project Planning Activities

One of the objectives of the Redevelopment Plan is to attract private capital into the area. To accomplish this, the City reasons that by funding public improvements new private investments will be attracted into the area, thereby encouraging proper utilization of the area and returning it to a useful and productive condition.

* * * *

310 Citizen Participation

A committee, consisting of representatives selected by the property owners in the Pueblo Uno Area, shall be formed. **One purpose of the committee would be to participate in the formation of plans, in the implementation of projects and to make formal recommendations to the City Council before any public hearings are conducted relative to changes in the Pueblo Uno Plan.**

City administration shall present no plans or project recommendations to the City Council without first submitting them to the citizens committee for recommendation to the Council.

* * * *

Integrated Parking

One of the objectives of the Core Area Sketch Plan, and relative to new development within the project area is to provide convenient parking. This can be accomplished by integrating the parking for the structure on the second or second and third levels of the structure. Such parking facilities would generally be de voted to short-term parkers; e.g., shoppers, clients, visitors and residents.

PUEBLO UNO REDEVELOPMENT PLAN

Prepared by

The Redevelopment Agency
of the City of San Jose

Adopted by

The City Council on
December 6, 1983
Ordinance No. 215210

100. DESCRIPTION OF PROJECT

101. Introduction

This Redevelopment Plan (hereafter the "Plan") for the Pueblo Uno Redevelopment Project (hereafter the "Project") has been prepared by the Redevelopment Agency of the City of San Jose (hereafter the "Agency") **pursuant to the Community Redevelopment Law of the California Health and Safety Code, and all applicable local laws and ordinances.**

This plan conforms to the General Plan of the City of San Jose insofar as the General Plan applies to the Project.

This Plan provides the Agency with powers, duties and obligations to implement the program generally formulated in this Plan for the redevelopment, rehabilitation and revitalization of the area within the boundaries of the Project (the "Project Area"). Due to the needs of the Project, the long-term nature of the Plan, and the need for flexible response to such factors as market and financial conditions, **participating property owner** and potential developer **needs** as well as opportunities for Agency action, this Plan does not present a precise plan or establish specific projects for the redevelopment, rehabilitation and revitalization of the Project Area, neither does this Plan present specific proposals in an attempt to solve or alleviate the problems and issues identified by the community relating to the Project Area. Instead, this Plan presents a process and a basic framework within which specific plans will be presented, specific solutions will be proposed, and specific projects may be approved.

The major goal of this Plan is to advance the purposes of the Community Redevelopment Law by:

A. **The strengthening of the economic base of the Project Area and the community generally** by the provision of necessary assistance to stimulate new commercial and/or industrial expansion, and growth of employment.

B. The re-planning, re-design, and development of undeveloped areas which are economically stagnant, physically constrained, or improperly utilized.

C. The elimination of environmental deficiencies in the Project Area, including small and irregular lots, obsolete

and aged building types, substandard alleys and deteriorated public improvements, and the like.

D. The strengthening of retail and other commercial functions in the downtown area.

E. The assembly of land into parcels suitable for appropriate, integrated development designed to provide improved pedestrian and vehicular circulation in the Project Area.

F. **The provision of adequate land for parking and open spaces.**

G. The establishment and implementation of performance criteria to assure high site design standards and environmental quality and other design elements which provide unity and integrity to the entire Project.

H. The expansion of the community's supply of low-and-moderate income housing.

* * * *

300. PROJECT PROPOSALS

301. Opportunities for Owners and Tenants

In accordance with this Plan and the rules for owner and tenant participation adopted by the Agency pursuant to this Plan and the Community Redevelopment Law, persons who are owners of real property in the Project Area shall be given a reasonable opportunity to participate in redevelopment by: (1) retaining all or a portion of their properties; (2) **acquiring adjacent or other properties in the Project Area;** (3) rehabilitation of existing buildings or improvements; (4) new development; or (5) selling their properties to the Agency and purchasing other properties in the Project Area.

The Agency shall extend reasonable preference to persons who are engaged in business in the Project Area to participate in the redevelopment of the Project Area, or to re-enter into business within the redeveloped Project Area, if they otherwise meet the requirements prescribed in this Plan. The Agency shall also extend reasonable preferences to tenants other than business tenants in the Project Area to re-enter within the redeveloped Project Area, if they otherwise meet the requirements prescribed

by this Plan. Such business, residential, institutional and semi-public tenants shall be given a reasonable opportunity, if they so desire, to purchase and develop real property in the Project Area in accordance with this Plan.

302. Owners and Tenants Committee

A committee, membership of which shall be open to all Project Area owners and tenants, may be formed pursuant to this Plan. Agency shall consult with the committee during development and implementation of Project proposals.

319. Development by the Agency

To the extent now or hereafter permitted by law, the Agency is authorized to pay for, develop or construct any publicly-owned building, facility, structure or other improvement either within or without the Project Area, for itself or for any public body or entity, which buildings, facilities, structures or other improvements are or would be of benefit to the Project Area. Specifically, the Agency may pay for, install or construct buildings, facilities, structures and other improvements and may acquire or pay for the land required therefor.

In addition to the public improvements authorized under this Section 319, the Agency is authorized to install and construct, or to cause to be installed and **constructed, within or without the Project Area,** for itself or for any public body or entity for the benefit of the Project Area, public improvements and public utilities, including, but not limited to, the following: (i) over and underpasses; (2) sewers; (3) natural gas distribution systems; (4) water distribution systems; (5) parks, plazas and pedestrian paths; (6) playgrounds; (7) **parking facilities**; (8) landscaped areas; and (9) street improvements.

HERBERT F. KAISER, ESQ.

The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184

Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY
OF SANTA CLARA

Case No. 594949

DAVID A. BOONE and STEPHEN P. FOX, individually and as general partners of DBS-3 GROUP, a California Limited Partnership, as general partners of MARKET/POST, LTD., a California Limited Partnership; DAVID GOGLIO and DONALD GOGLIO, individually and as general partners of THREE G'S, a California Limited Partnership,

Plaintiffs,

v.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,

Defendants.

ORDER SUSTAINING DEMURRERS
[Filed July 29, 1988]

The demurrers of defendants Redevelopment Agency of the City of San Jose ("Redevelopment Agency") and the City of San Jose ("City") to plaintiffs' Fourth Amended Complaint were heard and submitted by the parties on July 15, 1988, in Department 2 of this Court. James G. Gilliland, Jr., of Khourie, Crew & Jaeger, P.C., appeared for moving parties Redevelopment Agency

and City. Herbert F. Kaiser appeared for plaintiffs. Moving parties contended the Fourth Amended Complaint failed to state claims on which relief could be granted for each of the reasons asserted by the defendants in their opening and reply briefs as identified in the attached statement.

IT IS HEREBY ORDERED that for each of the reasons asserted by defendants the demurrers of the Redevelopment Agency and City to all three causes of action of plaintiffs' Fourth Amended Complaint are sustained without leave to amend.

Dated: July 29, 1988

/s/ GEORGE W. BONNEY
Honorable George W. Bonney
Judge of the Superior Court

Approved as to form:

Dated: July 26, 1988

/s/ HERBERT F. KAISER
Herbert F. Kaiser
Attorney for Plaintiffs

Dated: July 26, 1988

/s/ JAMES G. GILLILAND, JR.
James G. Gilliland, Jr.
Attorney for Defendants

ATTACHMENT

I. PLAINTIFFS HAVE NOT STATED FACTS CREATING AN ESTOPPEL AGAINST THE CITY OR AGENCY
   A. Established Public Policy Requires Dismissal of Plaintiffs' Equitable Estoppel Claim
   B. Plaintiffs Admittedly Did Not Rely On Any Promises Made Before October, 1982
   C. The City Officials' Clear Lack of Authority Bars Plaintiffs' Equitable Estoppel Claim

II. PLAINTIFFS MAY NOT PROSECUTE THEIR INVERSE CONDEMNATION CLAIM ON THE FACTS ALLEGED
   A. The Regulatory Activity Alleged Cannot Constitute A Compensable "Taking"
      1. Plaintiffs Have Not Suffered The Type Of Injury Compensable Under A "Taking" Theory
      2. Plaintiffs Cannot Allege Agency Conduct Giving Rise To An Inverse Condemnation Claim
   B. Plaintiffs' Are Absolutely Barred From Prosecuting Their Third Cause Of Action For Damages

III. PLAINTIFFS MAY NOT MAINTAIN THEIR SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF
   A. Plaintiffs' Challenges To The Validity Of The Pueblo Uno Redevelopment Plan And The Amendments To The Plan Are Barred By The Statute Of Limitations
   B. No Claim Is Stated For Declaratory Relief

IV. **THE NINTH CIRCUIT IN *BOONE, ET AL. V. REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE* (9th Cir. 3/1/88) 841 F.2d 886, *Pet. For Cert.* filed 5/31/88, HAS ENTERED A JUDGMENT THAT DISPOSES OF BOTH OF PLAINTIFFS' CLAIMS FOR PROMISSORY ESTOPPEL AND INVERSE CONDEMNATION** (Emphasis added)

Khourie, Crew & Jaeger, P.C.
Michael N. Khourie
James G. Gilliland, Jr.
Mark T. Jansen
One Market Plaza
Spear Street Tower, 40th Floor
San Francisco, CA 94105
Telephone (415) 777-0333

Joan Gallo
City Attorney, City of San Jose
Mollie J. Dent
151 West Mission Street
San Jose, CA 95110
Telephone: (408) 277-4454

Attorneys for Defendants
City of San Jose and Redevelopment
Agency of the City of San Jose

In the Superior Court of the State of California

In and For the County of Santa Clara

Case No. 594 949

David A. Boone, Stephen P. Fox, DSB-3 Group, Market/Post Ltd., Dave Goglio, Donald Goglio, Three G's,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, City of San Jose, and Does I-XX,
Defendants.

Judgment of Dismissal As To Defendants Redevelopment Agency of the City of San Jose and the City of San Jose

[Filed July 29, 1988]

It appearing from the files and records of this action that the Court has sustained the demurrers of the defendants Redevelopment Agency of the City of San Jose and the City of San Jose as

to all causes of action herein, and it further appearing that said defendants have applied for a judgment dismissing this action as to them,

IT IS HEREBY ORDERED, adjudged and decreed THAT THIS ACTION IS DISMISSED as to defendants Redevelopment Agency of the City of San Jose and the City of San Jose, and that those defendants are awarded their costs of suit incurred herein, subject to filing of a cost bill and settlement of said bill.

DATED: _____, 1988

GEORGE W. BONNEY
Judge of the Superior Court

ORDINANCE NO. 17778

AN ORDINANCE OF THE CITY OF SAN JOSE APROVING AND ADOPTING A REDEVELOPMENT PLAN FOR THE PUEBLO UNO PROJECT AREA SITUATE IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, SAID PLAN BEING ENTITLED "PUEBLO UNO REDEVELOPMENT PLAN, MAY 1975"; OVERRULING ALL PROTESTS OR OBJECTIONS THERETO; INCORPORATING SAID REDEVELOPMENT PLAN BY REFERENCE; DESIGNATING SAID REDEVELOPMENT PLAN AS THE OFFICIAL REDEVELOPMENT PLAN FOR SAID PROJECT AREA; MAKING FINDINGS AND DETERMINATIONS RESPECTING CERTAIN MATTERS AS REQUIRED BY LAW; AND OTHERWISE RELATING TO SAID REDEVELOPMENT PLAN, ITS PREPARATION AND ADOPTION.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

* * * *

SECTION 3. This Council hereby finds and determines, and declares that:

(1) The Pueblo Uno Project Area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in the Community Redevelopment Law.

(2) Said redevelopment plan will redevelop the said project area in conformity with the Community Redevelopment Law and in the interests of the public peace, health, safety and welfare.

(3) The adoption and carrying out of said redevelopment plan is economically sound and feasible.

(4) Said redevelopment plan conforms to the general plan of the City of San Jose entitled, "San Jose General Plan: 1966-2010," dated January 1966, as amended.

(5) The carrying out of said redevelopment plan will promote the public peace, health, safety and welfare of the City of San Jose and will effectuate the purposes and policy of the Community Redevelopment Law.

(6) **The condemnation of real property is not provided for in said redevelopment plan.**

(7) The redevelopment plan does not provide for the temporary or permanent displacement of occupants of housing facilities in said project area.

(8) That within a reasonable time before its approval of said redevelopment plan said Redevelopment Agency adopted, and made available for public inspection, rules to implement the owner participation provisions of said redevelopment plan.

(9) That said redevelopment plan contains adequate safeguards that the work of redevelopment will be carried out pursuant to said redevelopment plan, and provides for the retention of controls and the establishment of restrictions or covenants running with land sold or leased for private use for such periods of time and under such conditions as this Council deems necessary to effectuate the purposes of the Community Redevelopment Law.

* * * *

Recorded January 20, 1984
Santa Clara County Recorder
Serial #7953712; Book 1246;
Pages 98-100

ORDINANCE NO. 21510

ORDINANCE OF THE CITY OF SAN JOSE APPROVING AND ADOPTING AN AMENDMENT TO THE REDEVELOPMENT PLAN ENTITLED, "SECOND AMENDED REDEVELOPMENT PLAN PUEBLO UNO PROJECT"; ADDRESSING FINDINGS AND DETERMINATIONS RESPECTING CERTAIN MATTERS AS REQUIRED BY LAW; AND OTHERWISE RELATING TO SAID REDEVELOPMENT PLAN AND AMENDMENT

THE CITY COUNCIL OF THE CITY OF SAN JOSE DOES HEREBY ORDAIN AS FOLLOWS:

* * * *

H. **Said hearing did comply in all respects with said Community Redevelopment Law and was conducted in accordance with and as required by the laws of the State of California pertaining to such hearing;**

I. The Third Amendment to the Redevelopment Plan for Pueblo Uno Project area is necessary and desirable in order to carry out the redevelopment plan for the Project area.

J. The proposed method of financing the project as amended has been previously submitted to and approved by the Agency Board and City Council as part of the 1983-84 Capital Improvement Program for the Pueblo Uno Project Area.

K. **The condemnation of real property in the Project Area is necessary for the execution of the Redevelopment Plan.**

* * * *

Khourie, Crew & Jaeger, P.C.
Michael N. Khourie
James G. Gilliland, Jr.
Mark T. Jansen
One Market Plaza
Spear Street Tower, 40th Floor
San Francisco, CA 94105
Telephone (415) 777-0333

Attorneys for Defendants
City of San Jose and Redevelopment
Agency of the City of San Jose

In the Superior Court of the State of California

In and For the County of Santa Clara

Case No. 594 949

David A. Boone, Stephen P. Fox, DSB-3 Group, Market/Post Ltd., Dave Goglio, Donald Goglio, Three G's,
Plaintiffs,

v.

Redevelopment Agency of the City of San Jose, City of San Jose, and Does I-XX,
Defendants.

Memorandum of Points and Authorities In Support of Defendants' Demurrers To Plaintiffs' Fourth Amended Complaint

Date: March 22, 1988
Time: 9:00 a.m.
Dept: 14—Law & Motion

VII. PLAINTIFFS MAY NOT MAINTAIN THEIR SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

A. Plaintiffs' Challenges To The Validity Of The Pueblo Uno Redevelopment Plan And The Amendments To The Plan Are Barred By The Statute of Limitations

The gist of the plaintiffs' present complaint is that the City and Agency acted unlawfully and through improper procedures in amending and implementing the Redevelopment Plan in December 1983 and March 1984. (See FAC, paras. 46-47, 53-54, 67, 72(g), 79.) Plaintiffs' challenge to these redevelopment plan amendments are barred, however, by their failure to bring a timely challenge of these governmental actions.

The applicable statute of limitations, Cal.Health & S.C. § 33500, states that "[no] action attacking or otherwise questioning the validity of any . . . amendment to a redevelopment plan, . . . shall be brought . . . after the elapse of 60 days from . . . the date of adoption of the ordinance . . . amending the plan." This statute governs all challenges to either a plan amendment or any action taken pursuant to the plan. Plunkett v. City of Lakewood (1975) 44 Cal.App.3d 344, 115 Cal.Rptr. 885, 886; Community Redev. Agency of Los Angeles v. Superior Court (1967) 248 Cal.App.2d 164, 172, 56 Cal.Rptr. 201, 206. In Plunkett, supra, the court refused to entertain a suit claiming that a redevelopment ordinance was the result of fraud (similar to the pleading of inducement here):

> "Whether [plaintiff] claims the city council was wrong by mistake or wrong by intent, in either case he is contesting the validity of the plan, the adoption of the plan. The purpose of § 33500 is . . . to promote prompt adjudication of such challenges before substantial public funds have been expended and before relocation of business and people have rendered remedial action ineffective. . . . If suitors could avoid the requirements of § 33500 merely by adding allegations of fraud to their complaints the section would be rendered meaningless and its purpose lost."

44 Cal.App.3d at 347, 116 Cal.Rptr. at 886 (emphasis added). See also Redevelopment Agency v. Del-Camp Investments, Inc.

(1974) 138 Cal.App.3d 836, 113 Cal.Rptr. 762 (in condemnation proceedings brought pursuant to a redevelopment plan, condemnee could not challenge the plan's legality even though condemnation commenced more than 60 days after plan's adoption); Johnston v. Redevelopment Agency (9th Cir. 1963) 317 F.2d 872, 875, cert. denied (1963) 375 U.S. 915 (plaintiffs could not attack plan as violating requirements of federal Housing Act). Both Plunkett and Del-Camp Investments establish that section 33500 is an absolute bar against late challenges to redevelopment agency actions.

Alleged improprieties in the amendment process (for example, lack of compliance with procedural requirements and improper and illegal motivation behind the city's action) form the basis of plaintiffs' claims. These acts occurred in December 1983, when the Fourth Amended Plan was passed (FAC, paras. 46-47) or, at the latest, in March 1984, when the Development Agreement with Koll Company was approved (id., paras. 53-54.) Plaintiffs did not file their first action until December 12, 1984, in federal court. (Id., para. 70) Consequently, plaintiffs' request in the Second Cause of Action for a declaration that the "Plan" and "Amended Plan" are invalid and/or improperly implemented must fail. Defendants' demurrer to this cause of action should be sustained without leave to amend.

* * * *

J. David Black, Esq.
David T. Alexander, Esq.
Jackson, Tufts, Cole & Black
99 Almaden Boulevard, Suite 800
San Jose, California 95115
Telephone: (408) 998-1952

Attorneys for Defendant The Koll Company

United States District Court

Northern District of California

No. C 84 20772 WAI

David A. Boone and Stephen P. Fox, et al.,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, et al.,
Defendants.

Date: October 8, 1985
Time: 9:00 a.m.
Dept.: Hon. William A.
Ingram's Courtroom

Memorandum of Points and Authorities In Support of Motion To Dismiss Plaintiffs' Second Amended Complaint

VII.

PLAINTIFFS' ANTITRUST AND CIVIL RIGHTS CLAIMS ARE NO MORE THAN BELATED ATTEMPTS TO CHALLENGE A VALID REDEVELOPMENT PLAN

To the extent that plaintiffs' second amended complaint challenges any acts taken to complete or approve the Koll building, it is an untimely challenge to the December 6, 1983 amendment to the Redevelopment Plan and the March 29, 1984 resolution which authorized the Koll project. (Second Amended Complaint paragraphs 51, 56.) See, e.g., Redevelopment Agency of City and County of San Francisco v. Del-Camp Investments, Inc., 38 Cal. App. 3d 836, 113 Cal. Rptr. 762 (1974) (pursuant to H. & S. Code § 33500, a party could not challenge condemnation proceedings instituted more than sixty days after the enactment of a redevelopment plan approving such proceedings); Koll's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings, pp. 15-16. Thus plaintiffs may not challenge Koll's acts at building the office space and parking structure approved by the authority and directive of that amendment.

* * * *

[1931]

ALLIED TUBE & CONDUIT CORPORATION, Petitioner

v.

INDIAN HEAD, INC.

No. 87-157.

Argued Feb. 24, 1988.

Decided June 13, 1988.

[1933] Marvin E. Frankel, New York City, for petitioner.

Fredric W. Yerman, New York City, for respondent.

*Syllabus**

The National Fire Protection Association—a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government—sets and publishes product standards and codes related to fire protection. Its National Electric Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respon-

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

dent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondents proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464. The Court of Appeals reversed.

Held: *Noerr* antitrust immunity does not apply to petitioner. Pp. 1936-1941.

(a) The scope of *Noerr* protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, those urging the govenmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizonal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitoner does not enjoy the immunity afforded those who merely urge the government to restrain trade. Pp. 1936-1938.

(b) Nor does *Noerr* immunity apply to petitioner on the theory that the exclusion of plastic conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of **[1934]** governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although *Noerr* immunity is not limited to "direct" petitioning of government officials, the *Noerr* doctrine does not immunize every concerted activity that is genuinely intended to influence govern-

mental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 1938-1940.

(c) Unlike the publicity campaign to influence legislation in *Noerr*, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 1940-1941.

817 F.2d 938 (CA2 1987), affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

Justice BRENNAN delivered the opinion of the Court.

Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards are widely adopted into law by state and local governments. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The United States Court of Appeals for the Second Circuit held that *Noerr* immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code, which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the National Electric Code (Code) is the most influential electrical code in the nation. A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Among the electrical products covered by the Code is electrical conduit, the hollow **[1935]** tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or rejected by a simple majority of the members present. Alarmed that, if approved,

respondent's product might pose a competitive threat to steel conduit, petitioner, the nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to vote against the proposal. Petitioner alone recruited 155 persons—including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over $100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposals to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated.[1]

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. 26 Stat. 209, 15 U.S.C. § 1. A bifurcated jury trial began in March 1985. Petitioner conceded that it had

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[1] Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than four stories in the 1984 Code, and for all buildings in the 1987 Code.

conspired with the other steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless did "subvert" the consensus standard making process of the Association. **[1936]** App. 23-24. The jury also made special findings that petitioner's actions had an adverse impact on competition; were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of $3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.[2]

The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the (Association] with

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[2] Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages *only* on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments." 817 F.2d 938, 941, n. 3 (CA2 1987) (emphasis added). We decide the case as it was framed by the Court of Appeals.

respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under *Noerr* as indirect attempts to influence state and local governments. 817 F.2d 938 (CA2 1987). We granted certiorari to address important issues regarding the application of *Noerr* immunity to private standard-setting associations.[3] 484 U.S. ____, 108 S.Ct. 65, 9 L.Ed.2d 29 (1987).

II

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *Mine Workers v. Pennington,* 381 U.S. 657, 669-672, 85 S.Ct. 1585, 1593-1595, 14 L.Ed.2d 626 (1965); and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Noerr, supra,* 365 U.S., at 136, 81 S.Ct., at 529; see also *Pennington, supra,* 381 U.S., at 671, 85 S.Ct., at 1594. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. *Noerr, supra,* 365 U.S., at 143, 81 S.Ct., at 532-533. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the cam-

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[3] We also granted certiorari on the issue whether, if not immune under *Noerr,* petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

paign employs **[1937]** unethical and deceptive methods. *Noerr, supra,* 365 U.S., at 140-141, 81 S.Ct., at 531. BVut in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[4] *California Motor Transport, supra,* 404 U.S., at 512-513, 92 S.Ct., at 612.

In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, Antitrust Law ¶ 1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.[5] See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 571, 102 S.Ct. 1935, 1945, 72 L.Ed.2d 330 (1982). Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. See, *e.g., ibid.; Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). See also *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d

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[4] Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. *Noerr,* 365 U.S., at 144, 81 S.Ct., at 533; *California Motor Transport,* 404 U.S., at 511, 92 S.Ct., at 612.

[5] "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, Antitrust Law ¶ 1503, p. 373 (1986).

445 (1986). When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, compare *Hydrolevel, supra,* 456 U.S., at 570-573, 102 S.Ct., at 1944-1946 (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations.[6]

Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. 817 F.2d, at 943-944. Whatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707-708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962). See also *id.,* at 706-707, 82 S.Ct., at 1414-1415; *Goldfarb v. Virginia State* **[1938]** *Bar,* 421 U.S. 773, 791-792, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975). "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Hallie v. Eau Claire,* 471 U.S. 34, 45, 105 S.Ct. 1713, 1719-1720, 85 L.Ed.2d 24 (1985). The dividing line between restraints resulting from governmental action and those resulting from

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[6] See 2 J. von Kalinowski, Antitrust Laws and Trade Regulation §§ 61.01[3], 61.03, 61.04, pp. 61-6 to 61-7, 61-18 to 61-29 (1981) (collecting cases). Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See *Radiant Burners,* 364 U.S., at 659-660, 81 S.Ct., at 367. See also *Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

private action may not always be obvious.[7] But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.

Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See 817 F.2d, at 939, n. 1. Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means of influencing legislation regulating electrical conduit. This claim to *Noerr* immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances. Nor can we quarrel with petitioner's contention that, given the wide-spread adoption of the Code into law, any effect the 1981 Code had in the marketplace of its own force was, in the main,

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[7] See, *e.g.*, *California Motor Transport*, 404 U.S., at 513, 92 S.Ct., at 613 (stating in dicta that "[c]onspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); *Mine Workers v. Pennington*, 381 U.S. 657, 671, and n. 4, 85 S.Ct. 1585, 1594, and n. 4, 14 L.Ed.2d 626 (1965) (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting *Continental Ore*); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962); 1 P. Areeda & D. Turner, Antitrust Law ¶ 206 (1978) (discussing the extent to which *Noerr* immunity should apply to commercial transactions involving the government). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-792, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975); *Continental Ore*, *supra*, 370 U.S., at 706-707, 82 S.Ct., at 1414.

incidental to petitioner's genuine effort to influence governmental action.[8] And, as petitioner persuasively argues, the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for *Noerr* itself immunized a form of "indirect" petitioning. See *Noerr*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

Nonetheless, the validity of petitioner's actions remains an issue. We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to **[1939]** enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463, 65 S.Ct. 716, 725-729, 89 L.Ed. 1051 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessa-

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[8] The effect, independent of governmental action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 817 F.2d, at 941, n. 3. Given our disposition *infra*, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally *Noerr*, 365 U.S., at 142, 81 S.Ct., at 532 (noting that in that case there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

rily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's non-legislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see *Noerr, supra,* 365 U.S., at 140-141, 81 S.Ct., at 531, simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified—nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in *Noerr* we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers

and their customers. *Noerr, supra,* 365 U.S., at 142, 81 S.Ct., at 532. But we noted there that:

> "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be **[1940]** compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." 365 U.S., at 142-143, 81 S.Ct., at 532.

In light of those findings, we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidential" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id.,* at 143, 81 S.Ct., at 532-533. The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that one group or the other will get hurt by the arguments that are made." *Id.,* at 144, 81 S.Ct., at 533. As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws:

> Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions

> of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *Id.*, 365 U.S., at 140-141, 81 S.Ct., at 531 (footnote omitted).

In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity.[9]

Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decision-making, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See *supra*, at 1937-1938. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in *Noerr*, be characterized as an activity that has traditionally been regulated with extreme caution, see *Noerr, supra*, 365 U.S., at 141, 81 S.Ct., at 531, or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," 365 U.S., at 136, 81 S.Ct., at 529. And petitioner did not confine itself to efforts to persuade an independent decisionmaker, compare *id.*, at 138, 139, 81 S.Ct., at 530 (describing the immunized conduct as "mere solicitation"); rather, it organized and orchestrated the

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[9] Similarly in *California Motor Transport* any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." 404 U.S., at 511, 92 S.Ct., at 612; see also *id.*, at 512-513, 92 S.Ct., at 612-613.

actual exercise of the Association's decisionmaking authority in setting a standard. Nor can the setting of the Association's Code be **[1941]** characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Compare *id.* at 136, 81 S.Ct., at 529. Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, 81 S.Ct., at 531, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.[10]

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[10] It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, *post,* at 1945, the dissent does not dispute that the types of activity we describe *supra,* at 1938-1939, could not be immune under *Noerr* and fails to offer an intelligible alternative for distinguishing those non-immune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," *post,* at 1945, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so *through improper means.*" *Sessions Tank Liners, Inc. v. Joor Mfg.,* 827 F.2d 458, 465, n. 5 (1987) (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action. 365 U.S., at 144, 81 S.Ct., at 533. See also P. Areeda & H. Hovenkamp, Antitrust Law ¶ 203.1a, pp. 13-14 (1987 Supp.). More importantly, the Ninth Circuit's ap-

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915, 102 S.Ct., at 3426. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.[11]

[1942] Thus in this case the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts must, despite their political impact, be evaluated under the

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proach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. *Post*, at 1944. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." 827 F.2d, at 465.

[11] Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under *Claiborne Hardware*, we do not suggest that the absence of anticompetitive purpose is necessary for *Noerr* immunity. As the dissent points out, in *Noerr* itself the major purpose of the activity at issue was anticompetitive. *Post*, at 1943-1944. Our statement that the "ultimate aim" of petitioner "is not dispositive," *supra* at 1939, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability.

standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply be adopting rules that fail to provide such safeguards.[12] The issues of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. *Noerr, supra,* 365 U.S., at 137-138, 81 S.Ct., at 529-530. See also *California Motor Transport,* 404 U.S., at 510, 92 S.Ct., at 611-612. Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific

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[12] Even petitioner's counsel concedes, for example, that *Noerr* would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41-42.

evidence before a nonpartisan private standard-setting body.[13] And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums. What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

The judgment of the Court of Appeals is

Affirmed.

Justice WHITE, with whom Justice O'CONNOR joins, dissenting.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. **[1943]** 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), held that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the most part involved a public relations compaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and *California Motor Transport Co. v. Trucking*

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[13] The dissent mistakenly asserts that we today hold that *Noerr* immunity does not apply to mere efforts to persuade others to exclude a competitors's product from a private code. See *post*, at 1944-1945. Our holding is expressly limited to cases where an "economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants." *Supra* this page (emphasis added); see also *supra*, at 1940-1941 (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Compare *Noerr*, 365 U.S., at 136, 81 S.Ct., at 529. The dissent also mistakenly asserts that this description encompasses all private standard-setting associations. See *post*, at 1944. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, *e.g.*, *Sessions*, 827 F.2d, at 460, and n. 2.

Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases to the participants in those private organizations, such as National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anti-competitive effects and do not withstand scrutiny under the rule of reason. Believing that this result is a misapplication of the *Noerr* decision and an improvident construction of the Sherman Act, I respectfully dissent.

This case presents an even stronger argument for immunity than did *Noerr* itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," *ante,* at 1938, and that this was its "ultimate aim," *ante,* at 1939. In *Noerr,* the publicity campaign was dispersed widely among the public in a broad but necessary diluted attempt to move public opinion in hopes that government officals would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the governor's veto of a bill that had been passed in Pennsylvania. See 365 U.S., at 130, 81 S.Ct. at 525-526; see also 155 F.Supp. 768, 777-801 (ED Pa.1957). Here, NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it countrywide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in *Noerr.* This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with

respect to the passage and enforcement of laws," 365 U.S., at 138, 81 S.Ct., at 530.

Rather than directly confronting the severe damage that today's decision does to the *Noerr* doctrine, the majority asserts that the "ultimate aim" of petitioner's efforts "is not dispositive." *Ante,* at 1939. That statement cannot be reconciled with the statements quoted earlier from *Noerr,* where it was held that even if one of the major purposes, or even the *sole* purpose, of the publicity campaign was "to destroy the truckers as competitors," 365 U.S., at 138, 81 S.Ct., at 530, those actions were immunized from antitrust liability because ulimately they were "directed toward obtaining governmental action," *id.,* at 140, 81 S.Ct., at 531. The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." *Ante,* at 1942. It need hardly be said that all of this was also true in **[1944]** *Noerr.* Nobody condones fraud, bribery, or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, *ante,* at 1939, 1940, 1941, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anti-competitive

motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the states will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as NFPA as too far removed from the legislative process to warrant application of the doctrine announced in *Noerr* and faithfully applied in other cases. This was the view of Judge Sneed and his colleagues on the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458 (1987), and the reasons they gave for applying *Noerr* in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 states and the District of Columbia; 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will not think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," *ante* at 1942, (though with the knowing and inevitable result of

eliminating competition). In this case, for example, even if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would have risked facing **[1945]** the same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." *Ante,* at 1942. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued under the antitrust laws for *any* effects those standards have in the marketplace *other than* those flowing from their adoption into law. But the standards will have *some* effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the *Noerr* doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (*i.e.,* vote) on its recommendations as to particular product standards. Insisting that organizations like NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who possess an expert understanding of the products and their uses, which are primarily if not entirely those who design, manufacture, sell, and distribute them. Sanitizing such bodies by

discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying *Noerr* in this context could lead us to condone in future cases, *ante* at 1938-1939, too, but these are no more than fantasies, since nothing of the sort occurred in the wake of *Noerr* itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the *Noerr* immunity is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings.

Arms Unit

July 1, 1988

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

9/2/87-Opn
DC #CV-84-6363-MRP
Central California

June 27, 1988

Cathy A. Catterson
United States Court of Appeals
for the Ninth Circuit
Post Office Box 547
San Francisco, CA 94101

Re: Sessions Tank Liners, Inc., dba Southwest Tank Liners, Inc.,
v. Joor Manufacturing, Inc.
No. 87-916
(Your No. 86-6208 86-6470)

Dear Ms. Catterson:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Allied Tube & Conduit Corporation v. Indian Head, Inc., 486 U.S. ____ (1988).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

/s/ JOSEPH F. SPANIOL, JR.

For Publication
United States Court of Appeals
For the Ninth Circuit
Nos. 86-6208; 86-6470
D.C. No. CV-84-6363-MRP
Sessions Tank Liners, Inc. dba
Southwest Tank Liners, Inc.,
Plaintiff-Appellant,
v.
Joor Manufacturing, Inc., et al.,
Defendants-Appellees.

OPINION

On Remand from the
Supreme Court of the United States
Filed July 22, 1988
Before: Joseph T. Sneed, Robert Boochever and
David R. Thompson, Circuit Judges.
Opinion by Judge Sneed

SUMMARY

Antitrust

The court remanded the case for determining the extent to which appellant has established an antitrust violation on part of appellees under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process.

This case was before this court previously. Upon petitions for writ of certiorari, the petitions were remanded to this court for further consideration in the light of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ____. 56 U.S.L.W. 4539 (1988).

[1] The Supreme Court rejected the approach this court adopted in its disposition of this case. The Supreme Court made clear that the efforts of Joor Manufacturing to influence the Western Fire Chiefs Association to amend its fire code must be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. [2] The Supreme Court held that where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust

liability flowing from the effect that standard has of its own force in the marketplace.

OPINION

SNEED, Circuit Judge:

This case was before this court previously, 827 F.2d 458 (9th Cir. 1987). Petitions for writ of certiorari were filed in the Supreme Court of the United States. These petitions were remanded to us for further consideration in the light of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ____, 56 U.S.L.W. 4539 (1988).

[1] After examining *Allied Tube & Conduit Corp.* carefully, it is clear that we must remand this case to the district court for further proceedings. The Supreme Court explicitly rejected the approach this court adopted in its disposition of this case. *Id.* at ____ n.10, 56 U.S.L.W. at 4543 n.10. The Supreme Court has made clear that the context and nature of the efforts of Joor Manufacturing, Inc. to influence the Western Fire Chiefs Association (WFCA) to amend its influential fire code must "be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process." *Id.* at ____, 56 U.S.L.W. at 4543.

[2] Although the Supreme Court did not establish a bright line rule, it did state:

> Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

Id.

It is our belief that further proceedings in the district court are necessary to determine the extent to which Sessions Tank Liners, Inc. has established an antitrust violation on the part of Joor Manufacturing, Inc.

REMANDED.